UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Horizon Christian Fellowship et al., **Plaintiffs,** **v.** **Jamie R. Williamson, Sunila T. George, and Charlotte G. Richie, in their official capacities as Commissioners of the Massachusetts Commission Against Discrimination; and Maura Healey, in her official capacity as the Attorney General of Massachusetts,** **Defendants.**	**CIVIL ACTION NO. 16-12034-PBS**

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendants Commissioners of the Massachusetts Commission Against Discrimination ("MCAD") and Massachusetts Attorney General Maura Healey respectfully submit this memorandum in opposition to plaintiffs' motion for preliminary injunction.

INTRODUCTION

The plaintiffs, four Churches and their Pastors, bring this action seeking to enjoin enforcement of the Massachusetts public accommodations law, Mass. Gen. Laws c. 272, §§ 92A and 98, which prohibits discrimination in public accommodations and was recently amended to add "gender identity" as a protected class. Plaintiffs, who believe that "one's biological sex was determined by God," *Compl.* ¶ 85, allege that the law, as amended, infringes on their right to express their religious beliefs and to use their building facilities in a manner consistent with those beliefs, in violation of the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, and the Due Process Clause of the Fourteenth Amendment.

More broadly, plaintiffs challenge what they perceive to be government overreach, alleging that "[t]his case is about who controls Massachusetts churches." *See Plaintiffs' Mem.* at 1. But Massachusetts has a long and proud history of recognizing the rights of religious organizations to practice and express their faith, and the public accommodations law does not deprive plaintiffs of those rights. Indeed, the laws of the Commonwealth, enforced by both the MCAD and the Attorney General, specifically protect the rights of religious groups.

Moreover, the Massachusetts Supreme Judicial Court has construed the public accommodations law in a manner that protects religious freedoms and reconciles potential tensions between those freedoms and the Commonwealth's compelling interest in eradicating discrimination. Specifically, in *Donaldson v. Farrakhan*, 436 Mass. 94 (2002), the Court made clear that the public accommodations law does not extend to speech or religiously-expressive conduct that is protected by the First Amendment, while explaining that the law may properly be

applied if a religious organization hosts or engages in a "public, secular function."

Disregarding the narrowing construction of the law set forth in *Donaldson*, plaintiffs request a sweeping injunction restraining defendants from "enforcing or applying" the law against them. *See Compl.*, Prayer for Relief. But plaintiffs do not establish that they engage in specific conduct or activity to which the law, as construed in *Donaldson*, applies, nor have the defendants initiated enforcement of the law against the plaintiffs. To the contrary, plaintiffs allege that *all* of the activities described in the Complaint are an expression of their religious beliefs. For that reason, there is no objectively reasonable basis for plaintiffs' asserted fear that they will be subject to liability under the law for religiously-expressive speech or activities. The plaintiffs therefore lack standing to sue and are not likely to succeed on the merits of any of their claims. The Court accordingly should deny plaintiffs' motion for a preliminary injunction.

STATUTORY FRAMEWORK

The Massachusetts public accommodations law, Mass. Gen. Laws c. 272, §§ 92A and 98, prohibits discrimination based on race, color, religious creed, national origin, sex, gender identity, or sexual orientation, in the admission of any person to, or treatment in, a "public accommodation." Mass. Gen. Laws. c. 272, § 98 (as amended effective October 1, 2016). The law also contains two ancillary provisions targeting conduct that effectuates acts of discrimination: a provision that prohibits "aid[ing]" or "incit[ing]" discrimination, *see id.*, and a provision that prohibits a public accommodation from publishing, circulating, distributing, or displaying, an advertisement, notice, or other similar printed material "intended to discriminate against or actually discriminating against" a person in a protected class "in the full enjoyment of" such public accommodation. *Id.* § 92A, first para. (as amended effective July 8, 2016).

The law defines "public accommodation" as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public," including "an inn,

tavern, [or] hotel"; "a carrier . . . for the transportation of persons"; "a retail store"; "a restaurant, bar or eating place"; "an auditorium, theater, music hall, meeting place or hall"; "a place of public amusement, recreation, sport, exercise or entertainment"; and "a public library [or] museum." *Id.* § 92A, second para. (as amended effective October 1, 2016). Of significance here, the law provides that a public accommodation that lawfully separates access to its premises or portion thereof based on a person's sex "shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity." *Id.*[1]

The MCAD is authorized to receive and investigate complaints by any person claiming to be aggrieved by a violation of the public accommodations law; and the Attorney General likewise is authorized to file a complaint with the MCAD alleging a violation of the law. *See* Mass. Gen. Laws c. 151B, § 5; *see generally Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, 463 Mass. 472, 478-79 (2012).[2] During the MCAD's initial review of a complaint, it may determine not to commence an investigation if it finds that the commission lacks jurisdiction or that the information on the face of the complaint fails to support an inference of discrimination. 804 Code Mass. Regs. § 1.13(a). If the MCAD determines that it has jurisdiction, an investigating commissioner gathers information, including by obtaining a position statement from the person or organization (the "respondent") alleged in the complaint to

[1] The law imposes a fine of up to $2,500 and/or imprisonment for up to one year, on any person who discriminates in violation of the law or who "aid[s] or incite[s]" such discrimination; in addition, it renders such person liable for damages to any person aggrieved by an act of discrimination. *Id.* § 98. The statute also provides for a fine of up to $100, and imprisonment up to 30 days, for persons who violate the "publication" provision. *Id.* § 92A, third para.

[2] As an alternative, any person claiming to be aggrieved by discrimination in a public accommodation, including the Attorney General, may (after 90 days following the filing of a complaint with the commission) file an action in superior court. Mass. Gen. Laws c. 151B, § 9.
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have committed a discriminatory act. *Id.* §§ 1.10(8), 1.13. After completing the investigation, the investigating commissioner determines whether there is probable cause to believe that the respondent violated the law, *id.* § 1.15(7), and, if probable cause is found, the matter may proceed to a public hearing conducted by a hearing commissioner (different from the investigating commissioner). *Id.* §§ 1.20-1.21. Following the hearing, the hearing commissioner issues a written decision with findings of fact and conclusions of law. *Id.* § 1.21(18). Any party aggrieved by that decision may seek review by the full commission, *id.* § 1.23(1)(h), and a party aggrieved by the full commission's decision may seek judicial review. *Id.* § 1.24. At any stage of the proceedings, the MCAD may dismiss the complaint for lack of jurisdiction, *e.g.*, where it determines that the respondent is not a "public accommodation." *Id.* §§ 1.13(1)(a), 1.15(4).

In amending the public accommodations law to add "gender identity" as a protected class, the Legislature directed the MCAD and Attorney General to promulgate regulations, policies, or guidance to effectuate the purposes of the amendment. Massachusetts Senate Bill No. 2407, sec. 4 (July 6, 2016). On September 1, 2016, the MCAD issued "Gender Identity Guidance." *See* Affidavit of Yaw Gyebi, Jr., ¶ 3, Ex. A. The Guidance identified, as examples of entities that fall within the statutory definition of "public accommodation," retail stores, restaurants, malls, hotels, motels, businesses such as loan companies, taxi cab services, insurance companies, and public agencies, parks, beaches, and public roads. Gyebi Aff't Ex. A at 4. The Guidance added one sentence stating: "[e]ven a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public." *Id.* However, a footnote explained that all charges of discrimination received by the MCAD, "including those involving religious institutions," are reviewed on a "case-by-case basis." *Id.*

On December 5, 2016, the MCAD revised its "Gender Identity Guidance," to remove the sentence referring to a "spaghetti supper" as an example of a "public, secular function," replacing that sentence with the following two sentences:

> The law does not apply to a religious organization if subjecting the organization to the law would violate the organization's First Amendment rights. *See Donaldson v. Farrakhan*, 436 Mass. 94 (2002). However, a religious organization may be subject to the Commonwealth's public accommodations law if it engages in or its facilities are used for a "public, secular function." *Id.*

Gyebi Aff't ¶ 4, Ex. B.[3]

The Attorney General also issued "Gender Identity Guidance for Public Accommodations," on September 1, 2016. *See* Affidavit of Genevieve Nadeau, ¶ 2 and Ex. A. The Attorney General's Guidance lists, as examples of "public accommodations," "hotels, stores, restaurants, theaters, sports stadiums, health and sports clubs, hospitals, transportation services, museums, libraries, and parks." Nadeau Aff't Ex. A. It makes no mention of religious organizations. *Id.* At the time of the filing of the complaint, the Attorney General's website also listed additional examples of public accommodations, including laundromats, dry-cleaners, gas stations, barber shops, concert halls, bowling alleys, auditoriums, convention centers, and "houses of worship." *See* Nadeau Aff't ¶ 3.

Soon after plaintiffs filed their complaint, the Chief of the Attorney General's Civil Rights Division sent a letter to plaintiffs' counsel, on November 7, 2016, explaining that the Attorney General's website had been revised "to remove the categorical reference to 'houses of worship' as an example of a 'place of public accommodation' within the meaning of Mass. Gen.

[3] The revised MCAD Guidance changed the sentence explaining that MCAD reviews all charges "including those involving religious institutions, . . . on a case-by-case basis," moving it from a footnote to the text, and eliminating the reference to "religious institutions," so that the sentence in the revised Guidance states: "As required by statute, MCAD reviews each complaint of discrimination based on the particular factual circumstances presented." Gyebi Aff't Ex. B.

Laws. c. 272, §§ 92A & 98." *See* Nadeau Aff't ¶ 4 and Ex. B. The letter explained that, while religious facilities "may qualify as places of public accommodation if they host a public, secular function, an unqualified reference to 'houses of worship' was inconsistent with *Donaldson v. Farrakhan*, 436 Mass. 94 (2002), and we have removed that reference." Nadeau Aff't Ex. B. The letter noted that *Donaldson* "continues to provide important guidance on the application of" the public accommodations law. *Id.*

PROCEDURAL AND FACTUAL BACKGROUND

Plaintiffs Horizon Christian Fellowship, Swansea Abundant Life Assembly of God, House of Destiny Ministries, and Faith Christian Fellowship of Haverhill, and their respective pastors filed a complaint in this action on October 11, 2016. On the same date, plaintiffs filed a motion for preliminary injunction, seeking an order prohibiting defendants "from enforcing or applying [the public accommodations law] against plaintiffs." *See Plaintiffs' Mot.* at 1. Plaintiffs assert that the law violates their First Amendment rights of free exercise of religion, free speech, free association, and freedom of assembly, and the Due Process Clause. *Compl.*, First-Fifth Causes of Action. They request a preliminary and permanent injunction, as well as a declaration that the law is unconstitutional as applied to them. *Id.* Prayer for Relief ¶¶ 1-2. They also challenge the "publication" and "aiding or inciting" provisions on overbreadth grounds, claiming that those provisions are unconstitutional on their face. *Compl.* ¶ 209.

Plaintiffs believe that "God . . . made each person as either male or female"; that "maleness or femaleness is designed by God and is tied to biology, chromosomes, physiology, and anatomy"; and that "sex is an immutable trait." *See Compl.* ¶¶ 16-18. They allege that they "wish to communicate their religious beliefs regarding human sexuality and use their buildings in a manner consistent with" those beliefs. *Id.* ¶ 1. All of the plaintiff Churches have restrooms that are designated for persons based on biological gender. *Id.* ¶¶ 57, 64, 74, 82.

As alleged in the complaint, plaintiffs "engage in religious expression and practice in every activity they open to the public," including communal worship and other formal religious services, Sunday school classes, Bible studies, youth-oriented activities, and various community outreach events. *Id.* ¶ 10.[4] Plaintiffs "welcome the public to all of their activities" because they believe that doing so is part of their religious mission. *Id.* ¶ 11. Plaintiffs explain that "[e]ven activities [that] the Churches undertake that do not contain overt religious inculcation are religious in nature because they are motivated by the Churches' religious mission and engender other important elements of religious meaning, expression, and purpose." *Id.* ¶ 12.

Plaintiffs assert that the amendment of the law to include "gender identity" prohibits them from communicating their religious views concerning human sexuality and from using their building facilities in a manner consistent with those views. *See Plaintiffs' Mem.* at 4 ("simply communicating their beliefs about human sexuality and using their houses of worship consistently with their beliefs about biological sex" could result in enforcement proceedings). Plaintiffs allege that the Pastors wish "to preach . . . sermons addressing God's design for human sexuality and the Churches' beliefs about 'gender identity,'" and also communicate their message by posting sermons on their websites, writing articles, speaking on the radio, and speaking in their churches and public venues but "fear that if they were to do so they would violate the Act's prohibitions." *Compl.* ¶¶ 22, 24-25.

Plaintiffs also construe the statute as "[r]equiring the Churches to allow individuals to use

[4] In addition to providing regular worship and prayer services, the plaintiff Churches allegedly engage in numerous community outreach events that – by plaintiffs' characterization – are religiously-expressive, including, *e.g.*, meals for the homeless; food pantries; an "alcohol and chemical addiction recovery ministry for the community" that one plaintiff operates from its building and promotes on the radio; concerts; festivals; and a "basketball outreach" program for students. *See Compl.* ¶¶ 10-13, 52-99, 101-02.

the facilities reserved for the opposite biological sex," which they allege would "force[] plaintiffs "to speak a message that they do not want to speak." *Id.* ¶¶ 32-33. They also allege that the law prohibits them "from making statements that might cause individuals to believe that they will not be permitted access to sex-specific changing rooms, showers, and restrooms," including such statements made in sermons and other written or spoken statements. *Id.* ¶¶ 20-21, 23. All of the plaintiff Churches have unwritten policies and practices, which "flow . . . from their religious beliefs," and which limit changing rooms and restrooms to "members of the designated biological sex." *Id.* ¶¶ 91-92. Two of the Churches (Swansea Abundant Life Assembly of God and House of Destiny Ministries) have adopted written policies limiting access to restrooms, changing rooms, and showers based on biological sex but have refrained from publicizing the policies because they believe that the law prohibits them from doing so. *Id.* ¶¶ 31, 96-98.

Plaintiffs have received no communication from either the MCAD or Attorney General concerning the public accommodations law, nor has either agency received any complaints alleging discrimination by any of the plaintiffs under the public accommodations law. Nadeau Aff't ¶ 5; Gyebi Aff't ¶¶ 2, 5. Nonetheless, plaintiffs broadly assert that the MCAD "intends to apply the Act to churches," pointing to one sentence in the MCAD's (now superseded) "Gender Identity Guidance" and a former version of the Attorney General's website. *Plaintiffs' Mem.* at 3-4.

ARGUMENT

The plaintiffs have not shown that they engage in any specific speech or conduct that falls within the public accommodations law as construed by the Supreme Judicial Court in *Donaldson*. Plaintiffs accordingly lack standing and fail to demonstrate a likelihood of success on the merits, "the critical factor in the analysis." *Barr v. Galvin*, 584 F. Supp. 2d 316, 319 (D. Mass. 2008) (citing *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)). For that reason

alone, the Court should deny plaintiffs' request for a preliminary injunction. The other relevant factors also weigh against issuance of an injunction. The public accommodations law unquestionably serves a compelling public interest in eliminating discrimination, *see Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and plaintiffs have not shown an objectively reasonable fear of prosecution. Plaintiffs accordingly do not establish that they will suffer irreparable harm in the absence of an injunction or that the balance of hardships warrants injunctive relief.

I. PLAINTIFFS DO NOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THEY HAVE NOT SHOWN THAT THEY ENGAGE IN CONDUCT OR SPEECH WITHIN THE SCOPE OF THE PUBLIC ACCOMMODATIONS LAW.

Plaintiffs assert that they are faced with "a Hobson's choice between violating their faith and risking imprisonment." *Plaintiffs' Mem.* at 1. But plaintiffs' fear is not objectively reasonable, as it is premised on a reading of the public accommodations law that is at odds with *Donaldson*, where the Supreme Judicial Court held that the law does not apply to a religiously-affiliated event reflecting the "expression of religious viewpoints." 436 Mass. at 102.

In *Donaldson*, the question was whether a theater hosting a speaking event sponsored by the Nation of Islam was a place of "public accommodation." The event was promoted, organized, and funded by a mosque, and presented by minister Louis Farrakhan at a city-owned theater, to address drugs, crime, and violence in the community, and the role that men play in the community. *Id.* at 97-101. Based on the specific facts presented, the Court found that the event was not a "public, secular function" of the mosque and that the theater therefore was not a "public accommodation" at the time of the event. *Id.* at 99-100. Addressing plaintiffs' constitutional claim, the Court further found that application of the law to require the admission of women to the event "would be in direct contravention of the religious practice of the mosque"

because it would impair the "expression of religious viewpoints" of the mosque with respect to the "separation of the sexes" (part of the Nation of Islam's "belief system") and the role of men in the community. *Id.* at 101-02. The Court thus held that the "forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute" would "significantly burden" the mosque's rights of expression and association and thus violate defendants' First Amendment rights. *Id.* at 95, 101-02.

Plaintiffs have not shown that they engage in any specific conduct or speech that falls within the law as construed by *Donaldson*. By plaintiffs' characterization, all of their conduct and speech is religiously-expressive: *see Compl.* at ¶ 13 ("in all the Churches' activities, they are communicating their understanding of God's truth, and refraining from communicating message that violate the Churches' understanding of God's truth."); *id.* ¶¶ 101-02 ("Every event that occurs in the Churches' facilities is part of the exercise of their religious beliefs"); *id.* ¶ 134 ("The Churches want to communicate in writing and orally to their members and the public their religious beliefs regarding human sexuality and their facility use policies regarding access to their sex-specific showers and restrooms."). Those activities that the plaintiffs describe specifically, such as sermons, communual worship services, other religious services, Sunday school classes, and Bible studies, *see Compl.* ¶ 10, are plainly protected by the First Amendment.[5] *See Fort Des Moines Church of Christ v. Jackson*, 2016 WL 6089842, at *19-21

[5] The complaint more vaguely describes other activities, under the general rubric of community "outreach", which plaintiffs characterize as an expression of their religious beliefs, *see supra* page 7 & n.4. The complaint does not describe those community outreach activities with sufficient specificity to enable the Court to determine conclusively that such activities are *necessarily* entitled to First Amendment protection. But, it does appear from the allegations in the complaint that plaintiffs' outreach activities would likely be outside the scope of the public accommodations law (as not constituting a "public, secular" function under *Donaldson*). Of course, a determination (by the MCAD or a court) as to whether the public accommodations law applies to a *specific* church activity would require more particularized facts. For present

(S.D. Iowa, October 14, 2016) (holding that church was not likely to succeed on merits of its First Amendment claims challenging provisions prohibiting discrimination in public accommodations based on gender identity, where it failed to show, on the facts presented, that the challenged provisions "would ever apply to its conduct").[6]

For this reason, plaintiffs lack standing to bring their claims. A party asserting First Amendment rights may assert a pre-enforcement challenge to a law only where the party alleges either an intention to engage in conduct proscribed by the law or that he is chilled from exercising the right to free expression; in particular, the party must establish the existence of a "credible threat of enforcement" under the challenged law in order to establish standing. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (internal citation and quotation marks omitted). "Put another way, the fear of prosecution must be 'objectively reasonable.'" *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). Because plaintiffs do not allege that they engage in any specific speech or conduct that falls within the public accommodations law as construed in *Donaldson*, they lack standing to bring their claims.

A. The Plaintiffs Have Not Shown that Enforcement of the Law Will Violate Their Rights Under the Free Exercise or Establishment Clause.

Under the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. The Free Exercise

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purposes, it is clear that plaintiffs' conclusory assertions, based on the hypothetical possibility that the law might, at some future point, apply to their conduct, does not establish an "objectively reasonable" threat of prosecution warranting injunctive relief. *See Matos v. Clinton School District*, 367 F.3d 68, 73 (1st Cir. 2004) ("A preliminary injunction should not issue except to prevent a real threat of harm . . . . Preliminary injunctions are strong medicine, and they should not issue merely to calm the imaginings of the movant.").

[6] While the Iowa law contained an exemption for religious organizations acting to further a "bona fide religious purpose," *see* 2016 WL 6089842 *2, 4, the absence of an express "religious" exemption here does not meaningfully distinguish the Massachusetts law. *Donaldson* constitutes binding authority concerning the proper application of Mass. Gen. Laws. c. 272, §§ 92A and 98.

Clause protects "the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Under the Establishment Clause, "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (internal citation and quotation marks omitted). The Massachusetts prohibition on discriminatory treatment in public accommodations does not violate either aspect of the First Amendment.

Plaintiffs argue that prohibiting discrimination against protected classes in the admission to, or treatment in, public accommodations "infringes on the Churches' freedom to determine how they communicate their faith" through their speech and in the use of their buildings, allegedly in violation of the Free Exercise Clause. *See Plaintiffs' Mem.* at 8.[7] But, as explained above, church activities involving worship and expressions of religious belief – that is, activities protected by the Free Exercise Clause – are not within the application of the public accommodations law as construed in *Donaldson*. 436 Mass. at 100-102. As such, plaintiffs cannot show that their Free Exercise rights are threatened.

And even considering the narrow – and at this point hypothetical – enforcement of the law to a "public, secular" function of a church, the law would not violate the Free Exercise Clause. It is well-established that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of*

[7] Plaintiffs refer to this provision of the statute as the "facility-use mandate," *see Plaintiffs' Mem.* at 2, but the term is not apt, because the statute does *not* apply to the Churches – and thus would not "mandate" the manner in which they use their facilities – where application of the law would "impair[]" plaintiffs' "expression of religious viewpoints." *See Donaldson*, 436 Mass. at 102.

Hialeah, 508 U.S. 520, 531 (1993). The provision prohibiting discriminatory treatment is neutral on its face, as it does not "target[] religious beliefs" or "infringe upon or restrict practices because of their religious motivation." *Id.* at 533. Rather, the provision is aimed at eliminating discrimination against protected classes of persons in *all* public accommodations. For that reason, it also is a law of "general applicability." *Id.* at 543 ("general applicability" requirement prohibits government from enacting laws that selectively "impose burdens only on conduct motivated by religious belief"). Like the public accommodations law upheld in *Roberts v. United States Jaycees*, the Massachusetts prohibition on discriminatory treatment similarly "reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services," a "goal[] which is unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." 468 U.S. at 624.

Other courts that have considered challenges to public accommodations laws have rejected similar Free Exercise claims. In *Fort Des Moines Church of Christ*, an Iowa federal court held that a church, which challenged provisions prohibiting discrimination in public accommodations based on gender identity, was not likely to succeed on the merits of its Free Exercise claim, because the Iowa provisions were "neutral on their face," "generally applicable," and did not selectively impose burdens on religiously-motivated conduct. 2016 WL 6089842, at *20.[8] In sum, plaintiffs are unlikely to succeed on the merits of their Free Exercise claim.

Plaintiffs also cannot succeed on the merits of their Establishment Clause claim. The

[8] *See also Elane Photography, LLC v. Willock*, 309 P.3d 53, 58-59, 72-75 (N.M. 2013) (New Mexico public accommodations law, which prohibited discrimination based on sexual orientation, was a neutral law of general applicability and did not violate Free Exercise Clause), *cert. denied*, 134 S. Ct. 1787 (2014).

claim is not fleshed out in their memorandum and so should not be treated by the Court as a basis for injunctive relief. At most, plaintiffs seem to suggest that the mere exercise of authority by the MCAD to investigate a complaint that any of the plaintiffs have violated the Massachusetts law would constitute "government entanglement in religious affairs." *See Plaintiffs' Mem.* at 10. But there is no complaint of discrimination by any of the plaintiffs now, and so the claim is hypothetical. And if the assertion of "entanglement" were based on the fact that MCAD's Gender Identity Guidance (as revised) states that a religious organization "may be subject to" the public accommodations law "if it engages in or its facilities are used for a 'public, secular function,'" and that the MCAD reviews all charges of discrimination based on the particular facts presented, *see* Gyebi Aff't Ex. B at 4-5, such an assertion would not state a claim under the Establishment Clause.

The "mere exercise of jurisdiction" by an administrative agency like the MCAD, which is charged with investigating and adjudicating complaints of discrimination, does not violate the Free Exercise or Establishment Clause rights of a religious entity charged with discrimination. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986), where the Supreme Court held that an Ohio commission, which was charged with investigating claims of discrimination, "violates no constitutional rights by merely investigating the circumstances of [a teacher's] discharge" by a religious school. *Accord Temple Emanuel*, 463 Mass. at 440 (the MCAD "does not violate the First Amendment merely by investigating the circumstances of a minister's denial of reemployment in response to a complaint of discrimination") (citing *Dayton*). Plaintiffs' claim that the prohibition on discriminatory treatment violates the Establishment Clause accordingly is not likely to succeed.

B. The Plaintiffs Have Not Shown that the Law Will Infringe Their Freedom of Speech.

1. The Law Does Not Reach Religious Speech.

Plaintiffs assert that two ancillary provisions of the law – prohibiting a person from "aid[ing]" or "incit[ing]" discrimination and prohibiting "publication" of statements that effectuate discrimination – prevent plaintiffs from "communicat[ing] the Bible's teaching about biological sex in sermons, speeches and other public statements" and (in the case of two plaintiffs) from publishing their restroom policies, allegedly in violation of plaintiffs' free speech rights. *Plaintiffs' Mem.* at 11. Plaintiffs allege that all of the speech in which they engage or wish to engage is an expression of their religious beliefs. *See Compl.* ¶ 134. But under *Donaldson*, the public accommodations law does not apply to the "expression of religious viewpoints" – the speech in which plaintiffs wish to engage – because such expression is speech protected by the First Amendment. *See Donaldson*, 436 Mass. at 97-101; *id.* at 102 (public accommodations law could not properly be applied to a religiously-affiliated speaking event reflecting the "expression of religious viewpoints"). Accordingly, plaintiffs are not likely to succeed on the merits of their claim that these two provisions "chill and prohibit" their religious speech. *See, e.g., Fort Des Moines Church of Christ*, 2016 WL 6089842, at *18-19 (plaintiff church did not demonstrate likelihood of success on its as-applied free speech challenge to Iowa public accommodations law because it had "not shown that the challenged provisions would ever apply to its conduct").

2. The Provisions Prohibiting "Aiding" or "Inciting" Discrimination, and Prohibiting Publication of Discriminatory Statements, Do Not Infringe Free Speech.

Relatedly, plaintiffs characterize the "aid[ing] or incit[ing]" and "publication" provisions as "content" and "viewpoint"-based restrictions that are "presumptively unconstitutional" and

that must be reviewed under a strict scrutiny standard. *Plaintiffs' Mem.* at 12-14. But, again, plaintiffs cannot demonstrate that the law, including these provisions, applies to their religious speech or activities under *Donaldson*. And to the extent that plaintiffs arguably intend to assert a facial challenge to these provisions, such a claim fails, because even where the provisions do apply, they are best understood as regulating conduct or speech that effectuates discrimination and thus do not infringe on free speech rights. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (Massachusetts public accommodations law "does not, on its face, target speech or discrimination on the basis of its content, the focal point of the prohibition being rather on the *act* of discriminating against individuals in the provision of publicly available goods, privileges and services on the proscribed grounds.") (emphasis added).

"States can constitutionally regulate conduct even if such regulation entails an incidental limitation on speech," where such regulation is within the Government's constitutional power; furthers an important governmental interest unrelated to the suppression of free expression; and any incidental restriction on alleged First Amendment freedoms is no greater than is essential to furthering that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Massachusetts law unquestionably satisfies these criteria. *See Roberts v. United States Jaycees*, 468 U.S. at 624; *see also Jews for Jesus v. Jewish Community Relations Council*, 968 F.2d 286, 295-96 (2d Cir. 1992) (New York public accommodations law "making 'direct' discrimination unlawful" "easily" satisfies *O'Brien*).

To begin with, the "aid[]ing or incit[ing]" provision does not target speech; although aiding or inciting may be accomplished through speech, they need not be. *Jews for Jesus*, 968 F.2d at 296. Moreover, even assuming that this provision indirectly regulates speech, it extends only to "speech designed to secure a violation of the anti-discrimination statutes." *Id.* at 296.

The First Amendment, however, "provides no defense to persons who have used otherwise protected speech or expressive conduct to force or aid others to act in violation of a valid conduct-regulating statute," such as the Massachusetts law at issue. *Id.* (New York provisions prohibiting persons from "aid[ing] or incit[ing" discrimination were "unquestionably constitutional").[9]

The "publication" provision similarly extends only to speech that effectuates discriminatory conduct or is itself discriminatory. Under the provision, an "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation" may not "directly or indirectly . . . publish, issue, circulate, distribute or display," an "advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign . . . intended to discriminate against or actually discriminating against persons [of protected classes]" in the admission to or treatment in public accommodations. Mass. Gen. Laws c. 272, § 92A, 1st para. Fairly read, the provision prohibits, for example, a public accommodation from posting a notice that its facilities are open only to a single race. *Cf. Fort Des Moines Church of Christ*, 2016 WL 6089842, at *14-15 (Iowa provision banning "discriminatory publications" was aimed at preventing places offering goods and services to the public from communicating, through advertisements or similar postings, that their goods and services were not intended to be available to protected classes). Such a prohibition falls well within the limits imposed by the First Amendment. *See Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("Congress, for example, can prohibit employers from discriminating in hiring on the

[9] *See also Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 499, 519-22 (D.N.J. 1995) (New Jersey provisions making it unlawful to "aid" or "incite" any prohibited discrimination in business transactions did not violate church's free speech rights because the law "does not target expression" but instead is aimed at "conduct or secondary effects"), *aff'd on other grounds*, 99 F.3d 101 (3rd Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."). Indeed, "[i]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[10]

In sum, plaintiffs have not shown that the "aid[ing]" or "incit[ing]" or "publication" provisions apply, nor can they succeed on the merits of their Free Speech claim.[11]

3. The Law Is Not Overbroad.

Plaintiffs also assert a facial challenge to the law on overbreadth grounds, arguing that the law "sweeps within its ambit private religious speech that occurs before, during, and after worship services and all other religious programming." *Plaintiffs' Mem.* at 16. This claim is fundamentally flawed because plaintiffs fail to show the existence of a "substantial number of instances" in which the law cannot constitutionally be applied. Moreover, given the Supreme Judicial Court's narrowing construction of the law in *Donaldson*, there is no "realistic danger" that the law will "significantly compromise" the constitutional rights that plaintiffs have identified. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (facial overbreadth challenge will not succeed unless "there [is] a realistic danger that the statute

[10] *Cf. Ragin v. New York Times Co.*, 923 F.2d 995, 1003 (2d Cir. 1991) (rejecting First Amendment challenge to provision of federal Fair Housing Act that prohibited advertisements indicating racial preference upon finding that such advertisements were not protected commercial speech); *Fort Des Moines Church of Christ*, 2016 WL 6089842 at *15 (noting that "discriminatory messages in advertising" are not protected by First Amendment).

[11] Although the MCAD and Attorney General strongly contest plaintiffs' assertion that the "aiding and inciting" and "publication" provisions are subject to strict scrutiny, *see Plaintiffs' Mem.* at 12-14, the provisions would pass muster under even that heightened standard, for the reasons set forth above.

itself will significantly compromise recognized First Amendment protections of parties not before the Court"); *Jaycees*, 468 U.S. at 630-31 (holding that Minnesota public accommodations law was not overbroad, given state court's "willingness to adopt limiting constructions that would exclude private groups from the statute's reach, together with the commonly used and sufficiently precise standards it employed to determine that the Jaycees is not such a group"). Because plaintiffs have not demonstrated that "a substantial number of instances exist in which the [l]law cannot be applied constitutionality," *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 14 (1988), they are not likely to succeed on the merits of their overbreadth claim. *See Fort Des Moines Church of Christ*, 2016 WL 6089842 *15 (holding that church was unlikely to succeed on overbreadth challenge to Iowa public accommodations law, where it "fail[ed] to identify unconstitutionally broad applications of the instant provisions, let alone demonstrate that a substantial number of such applications exist").

C. The Law Is Not Unconstitutionally Vague.

Plaintiffs also assert that the law is unconstitutionally vague, alleging that they have "self-censored" their speech concerning the use of their facilities and "what their church leaders preach from the pulpit about human sexuality," allegedly as a result of the law's "imprecise language." *See Plaintiffs' Mem.* at 14. Plaintiffs are unlikely to succeed on this claim.

1. The Definition of "Public Accommodation" Is Not Vague.

Plaintiffs contend that the definition of a "public accommodation" is impermissibly vague insofar as "the legislature failed to provide a clear exemption for religious institutions." *See Plaintiffs' Mem.* at 15. This argument is without merit. A law is unconstitutionally vague, and thus in violation of the Due Process Clause, only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). "'Fair notice' is understood as notice short of semantic certainty," and, "[b]ecause

'words are rough-hewn tools, not surgically precise instruments[,] . . . some degree of inexactitude is acceptable in statutory language.'" *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (internal citation omitted). The definition of "public accommodations" readily passes muster under those standards.

Contrary to plaintiffs' assertion, *see Plaintiffs' Mem.* at 15 n.4, the fact that the definition of "public accommodation" does not provide an exemption for churches does not render it unconstitutionally vague. *Donaldson*'s narrowing construction of the law – to apply to religious organizations or facilities only with respect to a "public, secular function" – provides a meaningful, comprehendible standard. *Cf. Roberts v. United States Jaycees*, 468 U.S. at 629-30 (rejecting vagueness and overbreadth challenges where the Minnesota Supreme Court relied on "specific and objective criteria" to distinguish between "public" and "private" entities).[12]

Plaintiffs further assert that the MCAD's Guidance is "impossibly vague" because it states that the MCAD follows "a case-by-case approach" to determine whether any entity – including a church – is a "public accommodation." *Plaintiffs' Mem.* at 15. But the law is not rendered vague merely because, if the MCAD were to receive a complaint alleging discrimination by a plaintiff Church, it would be called upon to investigate the facts bearing on whether the law applied in the particular circumstances presented. That an enforcement agency must from time-to-time consider, after obtaining the facts, whether a church-related event constitutes a "secular" function does not violate the Due Process Clause. *Cf. Dayton, supra; see also, e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Comm'n*, 132 S. Ct. 694, 707-09 (2012) (addressing whether particular employee

[12] *See also Fort Des Moines Church of Christ*, 2016 WL 6089842 * 16 (rejecting vagueness challenge to "bona fide religious institution" and "bona fide religious purpose" in Iowa public accommodations law).

fell within "ministerial exception" to employment discrimination claims, and inquiring as to extent of the employee's "secular" duties and whether the employment served a "religious mission"); *Butler v. O'Brien*, 663 F.3d 514, 520 (1st Cir. 2011) ("The mere fact that close cases can be envisioned does not make a statute vague."), *cert. denied*, 132 S. Ct. 2748 (2012).

2. The "Publication" and "Aiding or Inciting" Provisions Are Not Vague.

Plaintiffs also argue that two other aspects of the law are impermissibly vague: the language in the "publication" provision prohibiting public accommodations from "indirectly" publishing material "intended to discriminate," *see* § 92A, 1st para., and the prohibition on actions that "aid[] or incite[]" discrimination, *see* § 92A, 2nd para. *See Plaintiffs' Mem.* at 15. For much the same reasons that these provisions are not overbroad, they also are not vague.

A common-sense understanding of "indirectly" is that it merely prohibits persons from arranging for the publication or distribution of materials that discriminate in public accommodations, as would be the case if, for example, a restaurant owner directed a subordinate to post a sign stating "No Trans-Gender Persons admitted." Similarly, the "intended to discriminate" language, read in context, applies to materials reasonably understood as conveying a message that persons in a protected class are not welcome in a place of public accommodation. *See Hermida v. Archstone*, 826 F. Supp. 2d 380, 384 (D. Mass. 2011) (court must interpret law so as to render it "consonant with sound reason and common sense") (internal citation and quotation marks omitted). In short, the terms "indirectly" and "intended to discriminate" are well within the comprehension of persons of ordinary intelligence, and plaintiffs thus are unlikely to succeed in their claim that the publication provision is vague. *See Fort Des Moines Church of Christ*, 2016 WL 6089842, at *2, 16-17 (finding plaintiff unlikely to succeed on merits of vagueness challenge to the phrase "in any other manner indicate" in provision making

it a discriminatory practice "[t]o directly or indirectly advertise or in any other manner indicate or publicize" that persons in protected classes were unwelcome in a public accommodation).

Plaintiffs also are unlikely to succeed on the merits of their vagueness challenge to the language prohibiting a person from "aid[ing] in or incit[ing]" discrimination. *See* Mass. Gen. Laws c. 272, § 98A, 2nd & 3rd paras. This language appears within § 98A, 3rd para., which also prohibits persons from "caus[ing] or "bring[ing] about" a violation of the discriminatory treatment provision. In this context, the terms "aid" and "incite" – like "cause" or "bring about" – refer to actions that effectuate discrimination and are not so lacking in standards to render them unconstitutionally vague. *Cf. Presbytery of New Jersey of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101, 105 (3d Cir. 1996) (affirming dismissal of overbreadth challenge to New Jersey law prohibiting discrimination based on sexual orientation, and noting, as example, that under provision prohibiting persons from "aiding," "abetting," and "inciting" discrimination, the State could prohibit a person from offering a reward to an employer for refusing to hire someone based on sexual orientation), *cert. denied*, 520 U.S. 1155 (1997).

II. THE REMAINING FACTORS DISFAVOR INJUNCTIVE RELIEF.

The plaintiffs fail to establish that they will suffer harm absent issuance of an injunction, because they have not set forth facts establishing an *objectively reasonable* fear of prosecution under the statute. *See Mangual*, *supra*. Plaintiffs' conclusory assertions that the statute "chills" their speech and results in "self-censorship" do not provide a basis for injunctive relief, as plaintiffs have not shown that they engage in any speech or conduct to which the Massachusetts public accommodations law, as construed by *Donaldson*, applies. *See also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Thus, the fact that the deprivation of First Amendment rights will usually constitute irreparable harm is beside the point. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

And because plaintiffs do not demonstrate any objectively reasonable fear of prosecution, the balance of hardships also weighs *against* injunctive relief. Massachusetts' prohibition on discrimination in public accommodations serves "compelling state interests of the highest order," *see Roberts v. United States Jaycees*, 468 U.S. at 624, and thus the public interest would be impeded by enjoining enforcement of the statute.[13]

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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Dated: December 7, 2016

[13] In their motion for preliminary injunction, plaintiffs do not press two claims set forth in the complaint, namely, their claims based on freedom of association and freedom of assembly. *See Compl.*, Third and Fifth Causes of Action. Defendants thus do not address those claims here, other than to state that the claims lack merit for the same reasons that plaintiffs fail to establish a likelihood of success on the merits of their other claims. Defendants will address the claims based on freedom of association and freedom of assembly in a motion to dismiss the complaint.

CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law, which I filed electronically through the Court's electronic case filing system on December 7, 2016, will be sent electronically to all parties registered on the Court's electronic filing system, and paper copies of the motion will be sent by first class mail, postage pre-paid, to non-registered parties.

/s/ Amy Spector
Amy Spector

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Horizon Christian Fellowship et al., **Plaintiffs,** **v.** **Jamie R. Williamson, Sunila T. George, and Charlotte G. Richie, in their official capacities as Commissioners of the Massachusetts Commission Against Discrimination; and Maura Healey, in her official capacity as the Attorney General of Massachusetts,** **Defendants.**	**CIVIL ACTION NO. 16-12034-PBS**

AFFIDAVIT OF YAW GYEBI, JR.

I, Yaw Gyebi, Jr., state as follows:

1. I am the Acting Chief of Enforcement at the Massachusetts Commission Against Discrimination. In my capacity as Acting Chief of Enforcement, I am familiar with the investigative functions of the MCAD to investigate allegations in complaints of discrimination filed or initiated under 804 C.M.R. § 1.10. Further, I have oversight of all complaints received by MCAD for investigation.

2. As of December 6, 2016, the MCAD has not received complaints against any of the plaintiffs in this action (Horizon Christian Fellowship and its pastor, George Small; Swansea Abundant Life Assembly of God, and its pastor, David Aucoin; House of Destiny Ministries/Igesia Casa de Destino, and its pastor, Esteban Carrasco; and Faith Christian Fellowship and its pastor, Marlene Yeo) alleging discrimination by any plaintiff under the public accommodations law. Nor had any complaint been initiated in the name of the Commission

against any of the plaintiffs alleging discrimination under the public accommodations law.

3. On September 1, 2016, the MCAD issued a "Gender Identity Guidance." A true copy of the MCAD's Gender Identity Guidance, dated September 1, 2016 is attached as Exhibit A.

4. On December 5, 2016, the MCAD revised its Gender Identity Guidance. A true copy of the revised Guidance approved by the Commissioners on December 5, 2016, is attached as Exhibit B.

5. MCAD has posted its Gender Identity Guidance(s) on its website, but has not communicated directly with plaintiffs concerning the public accommodations law.

Signed under the penalties of perjury this 6 day of December, 2016.

Yaw Gyebi, Jr., Esq.
Acting Chief of Enforcement
Massachusetts Commission Against Discrimination

EXHIBIT A

Gender Identity Guidance

Massachusetts Commission
Against Discrimination
September 1, 2016

In recent years, the Massachusetts Legislature has enacted legislation which specifically codifies gender identity in the list of protected classes covered by Massachusetts anti-discrimination laws. On October 1, 2016, these amendments to Massachusetts General Laws Chapter 272 will take effect prohibiting discrimination in places of public accommodation based on an individual's gender identity. The Massachusetts Commission Against Discrimination (MCAD) enforces G.L. c. 151B, c.151C and G.L. c. 272, §§ 92, 98 and 98A. The MCAD has developed this Guidance to educate the public about discrimination based on gender identity, to describe what evidence may be submitted to support a claim of gender identity discrimination, to inform individuals of their rights, and to assist employers, providers of housing, mortgage services, and owners, managers and agents of places of public accommodation in understanding their obligations under Massachusetts law.

I. Introduction

Since 2001, the MCAD has held that discrimination against transgender individuals could constitute sex and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, 37 Mass. Discrimination Law Rptr. 1 (2015) (finding employer liable for sex discrimination and gender-based disparate treatment of a transgender employee); Millett v. Lutco, 23 Mass. Discrimination Law Rptr. 231 (2001) (discrimination against a transgender individual constitutes illegal sex discrimination); Jette v. Honey Farms Mini Market, 23 Mass. Discrimination Law Rptr. 229 (2001) (transgender individuals with an underlying diagnosis of gender dysphoria may have a claim for disability discrimination under G.L. c. 151B). Pursuant to these decisions, the Commission routinely investigates and issues findings in discrimination cases filed by transgender individuals under the Fair Employment Practices Act, G.L. c. 151B and the Massachusetts Public Accommodation Act, G.L. c. 272. With the revision of G.L. c. 151B in 2012 and G.L. c.272 in 2016, the Legislature formally codified this prohibition of discrimination on the basis of gender identity in places of employment, housing, mortgage services and places of public accommodation.

On the federal side, the U.S. Equal Employment Opportunity Commission (EEOC) has taken steps to ensure that the rights of LGBT individuals are protected under Title VII—the federal law which prohibits employment discrimination. In 2012, the EEOC ruled that discrimination against a transgender individual is prohibited under Title VII's sex discrimination provision.[1] Similarly, in April 2015 the EEOC ruled that restricting a transgender employee from using a restroom facility consistent with the employee's gender identity and refusing to use the transgender employee's preferred name and gender pronoun constituted sex discrimination and sex-based harassment under Title VII.[2]

II. Massachusetts Law Coverage

On July 1, 2012, Massachusetts G. L. Chapter 151B was amended to prohibit discrimination in employment, housing, lending, credit and mortgage services based on an individual's gender identity. In addition to prohibiting discrimination based on gender identity, the Act expanded the definition of a hate crime to include criminal acts motivated by prejudice towards transgender individuals and prohibited discrimination based on

[1] Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).
[2] Lusardi v. McHough, EEOC Appeal No. 0120133395 (April 1, 2015).

gender identity in public schools. G.L. c. 22C, § 32 (hate crimes); G.L. c. 71, § 89 (public schools); G.L. c. 76, §§ 5, 12B (public schools). These latter provisions of the Act are generally not enforced by the MCAD, but are enforced by other law enforcement agencies such as the Massachusetts Attorney General's Office.[3]

In 2016, G.L. c. 272 was amended to include gender identity as a specifically protected class in places of public accommodation. The primary areas in which gender identity discrimination is enforced by the MCAD[4] are described below.

A. Employment

It is an unlawful discriminatory practice for an employer[5], or an employee or agent thereof, to discriminate against any employee or applicant for employment based upon that individual's gender identity with regard to recruitment, hiring, firing, discipline, promotion, wages, job assignments, training, benefits, and other terms and conditions of employment. Discrimination may take the form of unwelcome verbal or physical conduct, including but not limited to, derogatory comments, jokes, drawings or photographs, touching or gestures. Examples of discrimination in employment include the following:

- An employee takes a leave of absence to obtain gender affirming surgery, and upon her return from leave, her employer reduces her hours, downsizes her office, and demotes her.
- A job applicant who identifies as a man is rejected solely because the employer learns, after checking his employment references that the applicant identified as a woman in previous employment.
- A man is constantly harassed or made fun of by his supervisors for mannerisms perceived to be feminine.
- A supervisor ridicules a transgender subordinate and refuses to respect the employee's request for gender appropriate pronouns.[6]
- A transgender employee is consistently excluded from office meetings, office parties, and work-related events to which all other employees are invited.
- A transgender employee notifies his employer that his co-workers persistently mock and deride him because of his gender-identity, and the employer fails to take prompt remedial action to stop the harassment.

[3] In certain circumstances, the victim of a hate crime may bring an action at the MCAD. For example, if an employee is the victim of a gender identity based hate crime perpetrated by his/her supervisor in the context of employment, this could constitute discrimination and/or harassment.

[4] The MCAD has limited jurisdiction over discrimination in education pursuant to G.L. c.151C.

[5] An employer is generally defined under G.L. c. 151B as one that employs six or more persons. Public employers are included regardless of the number of people employed.

[6] MCAD and Tinker v. Securitas Security Services USA, Inc. and Najeeb Hussain, ___ Mass. Discrimination Law Rptr. __ (2016) (supervisor continued to refer to the Complainant as female and a "girl" in situations where the reference could no longer be deemed accidental or unintentional).

- An employer denies an employee access to the restroom that corresponds to the employee's gender identity.

In evaluating a claim of hostile work environment based on gender identity, the Commission considers the employer's evidence of its support for the employee. In a case where the company president met with all staff, communicated that the employer would not tolerate discrimination or harassment of a transgender employee and directed that the employee be treated with respect; disciplined an employee who sought not to interact with the transgender employee; changed company records to reflect the employee's name change; provided a leave of absence for surgeries; assisted the transgender employee in obtaining insurance coverage for the surgeries; arranged for the employee's use of a private bathroom prior to the completion of her gender affirming surgery and welcomed the employee's use of the women's restroom following surgery, the Commission found the Complainant was not subjected to a hostile work environment. Millett and MCAD v. Lutco, Inc., 30 Mass. Discrimination Law Rptr. 77, 85 (2008) (holding that "matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf").[7]

B. Housing

With the exception of certain statutory exclusions[8], G.L. c. 151B makes it an unlawful discriminatory practice for an owner, lessor, managing agent or other person having the right to sell, rent or lease or approve the sale, rental or lease of housing, to refuse to sell, rent, lease, approve the sale, rental or lease, or otherwise deny or withhold housing, or an interest therein, or otherwise discriminate against any person because of his or her gender identity. In addition, real estate brokers, real estate salespersons, and employees or agents thereof, may not discriminate on the basis of gender identity. Prohibited behavior includes all aspects of real property transactions, such as the refusal to show, rent or sell real property that is available for sale or lease, and the refusal to provide services or make repairs or improvements for any tenant or lessee based on gender identity. Examples of discrimination in housing include the following:

- A landlord, whose apartment does not fall within any of the statutory exclusions in G.L. c. 151B, refuses to show a transgender man an apartment for rent for reasons related to the prospective tenant's gender identity.

- A landlord adversely changes the terms and conditions of a transgender tenant undergoing gender reassignment therapy, resulting in the tenant's eviction.

- A realtor steers a transgender individual away from an apartment because he does not feel that the individual would "be a good fit for the neighborhood."

- The owner of a commercial property refuses to lease the property to a transgender rights group because of prejudice toward transgender individuals.

[7] As referenced herein, no employee is required to have any specific gender affirming surgery or surgery of any kind to have the person's gender identity respected in the workplace.

[8] For example, the lease of a single unit in a two-family dwelling, the other unit of which is occupied by the owner as his residence, is exempted from G.L. c. 151B. However, this exemption does not apply: (1) where the owner uses another person, such as (but not limited to) a realtor, to discriminate on his or her behalf, or (2) to discriminatory notices, advertisements, or statements.

C. Credit and Mortgage Services

Banks or other lending institutions may not discriminate against an applicant for credit on the basis of gender identity. Examples of discrimination in lending and credit include the following:

- A mortgage broker steers a transgender borrower, who is eligible for prime loans, into a sub-prime loan with high monthly payments and interest rate and excessive prepayment penalties.

- A credit card company refuses to issue a credit card to a transgender man because he previously identified as a woman.

D. Places of Public Accommodation

A place of public accommodation is defined as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public." G.L. c. 272, § 92A. This definition includes a wide variety of private and public places, such as retail stores, restaurants, malls, public agencies, public parks, beaches and public roads. The statute includes businesses that provide services and is not restricted to a person's entrance into a physical structure. Businesses that provide services that have been found to be covered by the public accommodation law include loan companies[9], cab services[10], and insurance companies,[11] companies that provide long term disability benefits[12], and businesses that actively provide testing services. Currier v. National Board of Medical Examiners, 462 Mass. 1 (2012). The law also covers denying an individual access to a public place, benefit, process or proceeding. For example, a public agency that denies an individual the opportunity to apply for a taxi driver's license based on the person's protected class would be in violation of G.L. c. 272. MCAD & Adam Apache v. City of Springfield Police Department, 34 Mass. Discrimination Law Rptr. 59 (2012) (dismissed on other grounds).

Under G.L. c. 272, § 98, places of public accommodation may not discriminate against, or restrict a person from services because of that person's gender identity. For example, a hotel or motel may not refuse to book a room for a person because of the person's gender identity. Even a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the general public.[13] All persons, regardless of gender identity, shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation.[14] For example, if it is a supermarket's practice to bag the customers' groceries, the store may not refuse to bag a person's groceries because of the customer's gender identity. Moreover, it is a violation of the law for any individual to aid or incite another in making a distinction, discriminating against or restricting an individual from a place of public accommodation on the basis of gender identity.[15]

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[9] Local Finance Co. of Rockland v. Massachusetts Comm'n Against Discrimination, 355 Mass. 10, 15 (1968).
[10] Lumley v. Flynn, 5 Mass. Discrimination Law Rptr. 1031 (1983).
[11] King v. Hanover Ins. Co., 2 Mass. Discrimination Law Rptr. 1429 (1981).
[12] See Samartin v. Metropolitan Life Ins. Co., 27 Mass. Discrimination Law. Rep. 210, 213-214 (2005);
[13] All charges, including those involving religious institutions or religious exemptions, are reviewed on a case-by-case basis.
[14] This right is subject to the lawful conditions and limitations applied to all persons.
[15] Violation of the law shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both. G.L. c. 272, § 98. In addition, the violator shall be liable to the aggrieved person for damages.

Under G.L. c. 272, § 92A, any place of public accommodation that lawfully separates access to a place or portion thereof based on a person's sex, shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person's gender identity. This means that a movie theater that has restrooms designated as "Men's Restroom" and "Women's Restroom" must allow its patrons to use the restroom which is consistent with their gender identity. A health club with locker rooms designated as male and female must grant all persons full enjoyment of the locker room consistent with their gender identity. A public swimming pool with changing rooms designated male and female must allow the public to use the changing room consistent with their gender identity.

Under G.L. c. 272, § 92A, the law provides that a place of public accommodation may not distribute, publish or display an advertisement, notice, or sign[16] intended to discriminate against or actually discriminating against persons of any gender identity. For example, if a retailer distributes a policy requiring its customers to present a driver's license as the sole acceptable means of identification for purposes of paying by check and requires the gender on the license to match that of the customer's appearance, this could constitute a violation of G.L. c. 272, § 92A.[17]

Other examples of discrimination in a place of public accommodation include:

- A restaurant refuses to seat a group of transgender patrons on the grounds that "this is a quiet restaurant," and "you will draw too much attention from our other patrons."
- A hotel refuses to host a conference of transgender individuals.
- A bakery refuses to bake a wedding cake for a customer because of their gender identity.
- A stationary store refuses to print wedding invitations for a customer because of their gender identity.

E. Retaliation

It is unlawful to retaliate against an individual who has opposed a discriminatory practice or filed a charge of discrimination, or who has testified, assisted or participated in a Commission investigation, proceeding or hearing. It is also unlawful for an employer to issue a negative reference about an employee in retaliation for that employee's protected activity, such as formally or informally charging the employer with discrimination.

III. Definitions and Proof

A. Definition of Gender Identity

Massachusetts law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." G.L. c. 4, § 7, Fifty-ninth.

[16] This includes any advertisement, circular, folder, book, pamphlet, and written or painted or printed notice or sign. G.L. c. 272, § 92A.

[17] The Commission recognizes that the federal government may impose its own requirements in certain circumstances, such as passports required for travel and entry into the United States.

Gender identity encompasses individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth. Some individuals who fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. Some individuals transition from living and working as one gender to another. Transition is the process by which a transgender person goes from presenting as one gender to another. For some, the process of transition may be lengthy. Some transgender individuals seek medical treatment such as counseling, hormone therapy, electrolysis, and gender affirming surgery. Some may not pursue medical treatment or surgery. The statutory definition of gender identity does not require the individual to have gender affirming surgery or intend to undergo surgery, nor does it require evidence of past medical care or treatment. Gender identity is distinguished from sexual orientation.[18] Gender identity refers to a person's internal sense of their own gender and its expression.

The law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. Courts and the MCAD recognized that discrimination on the basis of gender stereotypes is unlawful bias prior to the legislative changes in Massachusetts.[19] For example, discrimination against a person designated as female at birth and who identifies as a woman but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on sex and gender identity.

B. Proof Requirements

In most situations arising in employment, housing, mortgage services and places of public accommodation, it will not be appropriate to request documentation of an individual's gender identity. In the limited circumstances where it is necessary, an individual's gender identity may be demonstrated by any evidence that the gender identity is sincerely held as a part of the person's core identity. The evidence that the Commission will review in cases alleging gender identity discrimination includes, but is not limited to, medical history, medical/psychiatric care or treatment of the gender-related identity; consistent and uniform assertion of the gender-related identity or any other evidence that one's gender-related identity is sincerely held as part of one's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose. G.L. c. 4, § 7; Fifty-ninth see infra Section III C. Examples of the type of evidence which will assist the Commission in investigating claims of gender-identity discrimination are:

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[18] Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass. Super. Ct. 2002). Sexual orientation is based on the direction of one's physical and romantic attractions, which may include, but is not limited to heterosexual, homosexual, lesbian and bisexual.

[19] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender-based remarks reflecting view that a woman manager was not sufficiently feminine are evidence of gender discrimination); Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252, 259 (1st Cir. 1999) (Court stated, in dicta, that just as a woman may claim gender discrimination for being viewed as failing to meet stereotypical expectations of femininity, a man may base a claim of gender discrimination on evidence that he was viewed as not conforming to to stereotypical expectations of masculinity); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (an employer who makes employment decisions based on stereotypes about sexual roles or allows the creation of a hostile or abusive work environment based on sexual stereotypes, may be liable under Title VII's prohibition of discrimination on the basis of sex); Ianetta v. Putnam Investments, Inc., 142 F. Supp. 2d 131 (D. Mass. 2002) (discrimination against a man for failing to conform to gender stereotypes); Connor v. Hub Folding Box Co., 15 Mass. Discrimination Law Rptr. 1494 (1993), aff'd, Hub Folding Box Co., Inc. v. Mass. Comm'n Against Discrimination, 52 Mass. App. Ct. 1104 (Rule 1:28 decision, July 12, 2001) (gender stereotype that a woman with a tattoo was a prostitute, on drugs, or from a "broken home" reflects gender bias).

- Sworn statements by a Complainant and/or witnesses relating to the Complainant's sincerely held core gender-related identity;

- Sworn statements from the Complainant and/or witnesses relating to the Complainant's routine activities and conduct, such as dress, grooming, actions and use of gender pronouns;

- Sworn statements and/or medical records from medical or other professionals involved in the treatment of or transition of the individual seeking, in the process of, or who has completed gender transition;

- Evidence of hormone use, gender affirming surgeries, and/or other procedures that are for the purpose of affirming gender identity;

- Evidence of an effort to effectuate a legal name change, revision of birth certificate, passport, or Social Security card, re-designation of gender on a Massachusetts Department of Transportation Registry of Motor Vehicles form, or other legal documents reflecting gender identity.

C. Meaning of "Sincerely Held and Part of a Person's Core Identity"/Improper Purpose

The courts have yet to give significant guidance on how to interpret the requirement that gender identity be "sincerely held and part of a person's core identity." The considerations bearing on this requirement will necessarily be developed as the case law evolves; however, evidence of consistent conduct over a period of time is likely to support a claim of sincerely held core gender identity.

The law excludes from its coverage a gender-related identity that is "asserted for any improper purpose," such as an unlawful purpose. For instance, a fraudulent representation to obtain an otherwise unavailable employment-related benefit or a fraudulent effort to evade a legal obligation or an effort to commit a crime could constitute an improper purpose.

D. Restrooms and Sex-Segregated Facilities

No provision of G.L. c. 151B or G.L. c. 272 prohibits restrooms from being designated by gender. Prohibiting an individual from using a restroom or other sex-segregated facility consistent with their gender identity is a violation of G.L. c. 272, § 92A. Requiring an employee to provide identification or proof of any particular medical procedure (including gender affirming surgery) in order to access gender designated facilities, may be evidence of discriminatory bias.

IV. Transgender Protection under the Massachusetts Fair Educational Practices Law

While there has been legislative activity in Massachusetts amending G.L. c.151B and the Public Accommodations Act, G.L. c. 272, § 98, the Legislature did not amend the Fair Educational Practices Act, G.L. c. 151C. MCAD investigates and adjudicates claims brought pursuant to this statute, where there is evidence of discrimination in limited educational situations based on gender, disability and/or perceived sexual orientation.[20] As described in Section I, the Commission has held that discrimination against transgender

[20]The Massachusetts Department of Elementary and Secondary Education ("DESE") enforces G.L. c. 76, §5, which prohibits discrimination on the basis of gender identity in Massachusetts public schools. The Attorney General's Office also enforces Massachusetts laws prohibiting hate crimes on the basis of gender identity in public schools, G.L. c. 22C,

individuals may be prohibited under the proscriptions against gender and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, supra; Millett v. Lutco, supra.; Jette v. Honey Farms Mini Market, supra. The facts of a particular case may also support a claim of discrimination based on sexual orientation. Id.

Examples of discrimination in an educational institution include:

- A graduate school refuses to admit a transgender man who applies when it learns from the applicant's educational records that he previously identified as a woman.[21]

- A graduate school refuses to allow a transgender woman graduate student to serve as a resident assistant in a woman's dormitory because she previously identified as a man.

V. Best Practices

The Commission encourages employers, housing providers, places of public accommodation and all entities subject to the law to foster an inclusive and welcoming environment by following best practices recommended by the American Bar Association[22] which may include the following:

- Revise non-discrimination, equal opportunity, non-harassment, and other employment-related policies to include a statement that discrimination and harassment on the basis of gender identity is prohibited;

- Update personnel records, payroll records, email systems, and other documents to reflect employee's stated name and gender identity, and ensure confidentiality of any prior documentation of an employee's pre-transition name or gender marker;

- Prohibit derogatory comments or jokes about transgender persons from employees, clients, vendors and any others, and promptly investigate and discipline persons who engage in discriminatory conduct;

- Use names, pronouns, and gender-related terms appropriate to employee's stated gender identity in communications with employee and with others;

- Avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity;

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§32; discrimination in public and charter schools. G.L. c. 22C, §32; G.L. c. 71, §89; G.L. c. 76, §§5, 2B. See http://www.doe.mass.edu/ssce/GenderIdentity.pdf. In May, 2016, the U.S. Department of Education, Office of Civil Rights, announced that it would treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations, and that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.

[21] The Fair Educational Practices Act prohibits discrimination against any person seeking admission to a vocational training institution or to a program or course of study leading to a degree, beyond a bachelor's degree, because of sex or to discriminate against any student on the basis of gender, sexual orientation, admitted to a vocational training institution in providing benefits, privileges, and placement services.

[22] American Bar Association's Commission on Sexual Orientation and Gender Identity, "Best Practices for Promoting LGBT Diversity" published 2011.

- Provide the public and employees access to any sex-segregated facility, i.e. bathrooms, locker room facilities, based on the employee's stated gender identity;

- Incorporate in diversity, anti-discrimination, and anti-harassment trainings information about transgender individuals and employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace or in the place of public accommodation;

- Employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace;

- Landlords or property owners should take appropriate remedial action to ensure cessation of harassment by other tenants based on gender identity.

EXHIBIT B

Gender Identity Guidance

Massachusetts Commission
Against Discrimination
Revised December 5, 2016

In recent years, the Massachusetts Legislature has enacted legislation which specifically codifies gender identity in the list of protected classes covered by Massachusetts anti-discrimination laws. On October 1, 2016, these amendments to Massachusetts General Laws Chapter 272 took effect prohibiting discrimination in places of public accommodation based on an individual's gender identity. The Massachusetts Commission Against Discrimination (MCAD) enforces G.L. c. 151B, c.151C and G.L. c. 272, §§ 92, 98 and 98A. The MCAD has developed this Guidance to educate the public about discrimination based on gender identity, to describe what evidence may be submitted to support a claim of gender identity discrimination, to inform individuals of their rights, and to assist employers, providers of housing, mortgage services, and owners, managers and agents of places of public accommodation in understanding their obligations under Massachusetts law.

I. Introduction

Since 2001, the MCAD has held that discrimination against transgender individuals could constitute sex and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, 37 Mass. Discrimination Law Rptr. 1 (2015) (finding employer liable for sex discrimination and gender-based disparate treatment of a transgender employee); Millett v. Lutco, 23 Mass. Discrimination Law Rptr. 231 (2001) (discrimination against a transgender individual constitutes illegal sex discrimination); Jette v. Honey Farms Mini Market, 23 Mass. Discrimination Law Rptr. 229 (2001) (transgender individuals with an underlying diagnosis of gender dysphoria may have a claim for disability discrimination under G.L. c. 151B). Pursuant to these decisions, the Commission routinely investigates and issues findings in discrimination cases filed by transgender individuals under the Fair Employment Practices Act, G.L. c. 151B and the Massachusetts Public Accommodation Act, G.L. c. 272. With the revision of G.L. c. 151B in 2012 and G.L. c.272 in 2016, the Legislature formally codified this prohibition of discrimination on the basis of gender identity in places of employment, housing, mortgage services and places of public accommodation.

On the federal side, the U.S. Equal Employment Opportunity Commission (EEOC) has taken steps to ensure that the rights of LGBT individuals are protected under Title VII—the federal law which prohibits employment discrimination. In 2012, the EEOC ruled that discrimination against a transgender individual is prohibited under Title VII's sex discrimination provision.[1] Similarly, in April 2015 the EEOC ruled that restricting a transgender employee from using a restroom facility consistent with the employee's gender identity and refusing to use the transgender employee's preferred name and gender pronoun constituted sex discrimination and sex-based harassment under Title VII.[2]

II. Massachusetts Law Coverage

On July 1, 2012, Massachusetts G. L. Chapter 151B was amended to prohibit discrimination in employment, housing, lending, credit and mortgage services based on an individual's gender identity. In addition to prohibiting discrimination based on gender identity, the Act expanded the definition of a hate crime to include criminal acts motivated by prejudice towards transgender individuals and prohibited discrimination based on

[1] Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012).
[2] Lusardi v. McHough, EEOC Appeal No. 0120133395 (April 1, 2015).

gender identity in public schools. G.L. c. 22C, § 32 (hate crimes); G.L. c. 71, § 89 (public schools); G.L. c. 76, §§ 5, 12B (public schools). These latter provisions of the Act are generally not enforced by the MCAD, but are enforced by other law enforcement agencies such as the Massachusetts Attorney General's Office.[3]

In 2016, G.L. c. 272 was amended to include gender identity as a specifically protected class in places of public accommodation. The primary areas in which gender identity discrimination is enforced by the MCAD[4] are described below.

A. Employment

It is an unlawful discriminatory practice for an employer[5], or an employee or agent thereof, to discriminate against any employee or applicant for employment based upon that individual's gender identity with regard to recruitment, hiring, firing, discipline, promotion, wages, job assignments, training, benefits, and other terms and conditions of employment. Discrimination may take the form of unwelcome verbal or physical conduct, including but not limited to, derogatory comments, jokes, drawings or photographs, touching or gestures. Examples of discrimination in employment include the following:

- An employee takes a leave of absence to obtain gender affirming surgery, and upon her return from leave, her employer reduces her hours, downsizes her office, and demotes her.
- A job applicant who identifies as a man is rejected solely because the employer learns, after checking his employment references that the applicant identified as a woman in previous employment.
- A man is constantly harassed or made fun of by his supervisors for mannerisms perceived to be feminine.
- A supervisor ridicules a transgender subordinate and refuses to respect the employee's request for gender appropriate pronouns.[6]
- A transgender employee is consistently excluded from office meetings, office parties, and work-related events to which all other employees are invited.
- A transgender employee notifies his employer that his co-workers persistently mock and deride him because of his gender-identity, and the employer fails to take prompt remedial action to stop the harassment.

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[3] In certain circumstances, the victim of a hate crime may bring an action at the MCAD. For example, if an employee is the victim of a gender identity based hate crime perpetrated by his/her supervisor in the context of employment, this could constitute discrimination and/or harassment.

[4] The MCAD has limited jurisdiction over discrimination in education pursuant to G.L. c.151C.

[5] An employer is generally defined under G.L. c. 151B as one that employs six or more persons. Public employers are included regardless of the number of people employed.

[6] MCAD and Tinker v. Securitas Security Services USA, Inc. and Najeeb Hussain, ___ Mass. Discrimination Law Rptr. __ (2016) (supervisor continued to refer to the Complainant as female and a "girl" in situations where the reference could no longer be deemed accidental or unintentional).

- An employer denies an employee access to the restroom that corresponds to the employee's gender identity.

In evaluating a claim of hostile work environment based on gender identity, the Commission considers the employer's evidence of its support for the employee. In a case where the company president met with all staff, communicated that the employer would not tolerate discrimination or harassment of a transgender employee and directed that the employee be treated with respect; disciplined an employee who sought not to interact with the transgender employee; changed company records to reflect the employee's name change; provided a leave of absence for surgeries; assisted the transgender employee in obtaining insurance coverage for the surgeries; arranged for the employee's use of a private bathroom prior to the completion of her gender affirming surgery and welcomed the employee's use of the women's restroom following surgery, the Commission found the Complainant was not subjected to a hostile work environment. Millett and MCAD v. Lutco, Inc., 30 Mass. Discrimination Law Rptr. 77, 85 (2008) (holding that "matters that might be egregious in isolation appear less so in the context of the supportive actions which the Company took on Complainant's behalf").[7]

B. Housing

With the exception of certain statutory exclusions[8], G.L. c. 151B makes it an unlawful discriminatory practice for an owner, lessor, managing agent or other person having the right to sell, rent or lease or approve the sale, rental or lease of housing, to refuse to sell, rent, lease, approve the sale, rental or lease, or otherwise deny or withhold housing, or an interest therein, or otherwise discriminate against any person because of his or her gender identity. In addition, real estate brokers, real estate salespersons, and employees or agents thereof, may not discriminate on the basis of gender identity. Prohibited behavior includes all aspects of real property transactions, such as the refusal to show, rent or sell real property that is available for sale or lease, and the refusal to provide services or make repairs or improvements for any tenant or lessee based on gender identity. Examples of discrimination in housing include the following:

- A landlord, whose apartment does not fall within any of the statutory exclusions in G.L. c. 151B, refuses to show a transgender man an apartment for rent for reasons related to the prospective tenant's gender identity.

- A landlord adversely changes the terms and conditions of a transgender tenant undergoing gender reassignment therapy, resulting in the tenant's eviction.

- A realtor steers a transgender individual away from an apartment because he does not feel that the individual would "be a good fit for the neighborhood."

- The owner of a commercial property refuses to lease the property to a transgender rights group because of prejudice toward transgender individuals.

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[7] As referenced herein, no employee is required to have any specific gender affirming surgery or surgery of any kind to have the person's gender identity respected in the workplace.

[8] For example, the lease of a single unit in a two-family dwelling, the other unit of which is occupied by the owner as his residence, is exempted from G.L. c. 151B. However, this exemption does not apply: (1) where the owner uses another person, such as (but not limited to) a realtor, to discriminate on his or her behalf, or (2) to discriminatory notices, advertisements, or statements.

C. Credit and Mortgage Services

Banks or other lending institutions may not discriminate against an applicant for credit on the basis of gender identity. Examples of discrimination in lending and credit include the following:

- A mortgage broker steers a transgender borrower, who is eligible for prime loans, into a sub-prime loan with high monthly payments and interest rate and excessive prepayment penalties.

- A credit card company refuses to issue a credit card to a transgender man because he previously identified as a woman.

D. Places of Public Accommodation

A place of public accommodation is defined as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public." G.L. c. 272, § 92A. This definition includes a wide variety of private and public places, such as retail stores, restaurants, malls, public agencies, public parks, beaches and public roads. The statute includes businesses that provide services and is not restricted to a person's entrance into a physical structure. Businesses that provide services that have been found to be covered by the public accommodation law include loan companies[9], cab services[10], and insurance companies[11], companies that provide long term disability benefits[12], and businesses that actively provide testing services. Currier v. National Board of Medical Examiners, 462 Mass. 1 (2012). The law also covers denying an individual access to a public place, benefit, process or proceeding. For example, a public agency that denies an individual the opportunity to apply for a taxi driver's license based on the person's protected class would be in violation of G.L. c. 272. MCAD & Adam Apache v. City of Springfield Police Department, 34 Mass. Discrimination Law Rptr. 59 (2012) (dismissed on other grounds).

Under G.L. c. 272, § 98, places of public accommodation may not discriminate against, or restrict a person from services because of that person's gender identity. For example, a hotel or motel may not refuse to book a room for a person because of the person's gender identity. The law does not apply to a religious organization if subjecting the organization to the law would violate the organization's First Amendment rights. See Donaldson v. Farrakhan, 436 Mass. 94 (2002). However, a religious organization may be subject to the Commonwealth's public accommodations law if it engages in or its facilities are used for a "public, secular function." Id. All persons, regardless of gender identity, shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation.[13] For example, if it is a supermarket's practice to bag the customers' groceries, the store may not refuse to bag a person's groceries because of the customer's gender identity. Moreover, it is a violation of the law for any individual to aid or incite another in making a distinction, discriminating against or restricting an individual from a place of public accommodation on the basis of gender identity.[14]

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[9] Local Finance Co. of Rockland v. Massachusetts Comm'n Against Discrimination, 355 Mass. 10, 15 (1968).
[10] Lumley v. Flynn, 5 Mass. Discrimination Law Rptr. 1031 (1983).
[11] King v. Hanover Ins. Co., 2 Mass. Discrimination Law Rptr. 1429 (1981).
[12] See Samartin v. Metropolitan Life Ins. Co., 27 Mass. Discrimination Law. Rep. 210, 213-214 (2005);
[13] This right is subject to the lawful conditions and limitations applied to all persons.
[14] Violation of the law shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both. G.L. c. 272, § 98. In addition, the violator shall be liable to the aggrieved person for damages.

Under G.L. c. 272, § 92A, any place of public accommodation that lawfully separates access to a place or portion thereof based on a person's sex, shall grant admission to that place, and the full enjoyment of that place or portion thereof, consistent with the person's gender identity. This means that a movie theater that has restrooms designated as "Men's Restroom" and "Women's Restroom" must allow its patrons to use the restroom which is consistent with their gender identity. A health club with locker rooms designated as male and female must grant all persons full enjoyment of the locker room consistent with their gender identity. A public swimming pool with changing rooms designated male and female must allow the public to use the changing room consistent with their gender identity.

Under G.L. c. 272, § 92A, the law provides that a place of public accommodation may not distribute, publish or display an advertisement, notice, or sign[15] intended to discriminate against or actually discriminating against persons of any gender identity. For example, if a retailer distributes a policy requiring its customers to present a driver's license as the sole acceptable means of identification for purposes of paying by check and requires the gender on the license to match that of the customer's appearance, this could constitute a violation of G.L. c. 272, § 92A.[16]

Other examples of discrimination in a place of public accommodation include:

- A restaurant refuses to seat a group of transgender patrons on the grounds that "this is a quiet restaurant," and "you will draw too much attention from our other patrons."
- A hotel refuses to host a conference of transgender individuals.
- A bakery refuses to bake a wedding cake for a customer because of their gender identity.
- A stationary store refuses to print wedding invitations for a customer because of their gender identity.

As required by statute, MCAD reviews each complaint of discrimination based on the particular factual circumstances presented. See G.L. c. 151B, §5; Temple Emanuel of Newton v. MCAD, 463 Mass. 472 (2012).

E. Retaliation

It is unlawful to retaliate against an individual who has opposed a discriminatory practice or filed a charge of discrimination, or who has testified, assisted or participated in a Commission investigation, proceeding or hearing. It is also unlawful for an employer to issue a negative reference about an employee in retaliation for that employee's protected activity, such as formally or informally charging the employer with discrimination.

III. Definitions and Proof

A. Definition of Gender Identity

[15] This includes any advertisement, circular, folder, book, pamphlet, and written or painted or printed notice or sign. G.L. c. 272, § 92A.

[16] The Commission recognizes that the federal government may impose its own requirements in certain circumstances, such as passports required for travel and entry into the United States.

Massachusetts law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." G.L. c. 4, § 7, Fifty-ninth.

Gender identity encompasses individuals who are transgender. Transgender individuals are people whose gender identity is different from the sex assigned to them at birth. Some individuals who fit this definition of transgender do not identify themselves as such, and identify simply as men and women, consistent with their gender identity. Some individuals transition from living and working as one gender to another. Transition is the process by which a transgender person goes from presenting as one gender to another. For some, the process of transition may be lengthy. Some transgender individuals seek medical treatment such as counseling, hormone therapy, electrolysis, and gender affirming surgery. Some may not pursue medical treatment or surgery. The statutory definition of gender identity does not require the individual to have gender affirming surgery or intend to undergo surgery, nor does it require evidence of past medical care or treatment. Gender identity is distinguished from sexual orientation.[17] Gender identity refers to a person's internal sense of their own gender and its expression.

The law also protects persons whose gender identity is consistent with their assigned sex at birth, but who do not adopt or express traditional gender roles, stereotypes or cultural norms. Courts and the MCAD recognized that discrimination on the basis of gender stereotypes is unlawful bias prior to the legislative changes in Massachusetts.[18] For example, discrimination against a person designated as female at birth and who identifies as a woman but who does not act, dress, or groom herself in a manner consistent with feminine stereotypes, is unlawful discrimination based on sex and gender identity.

B. Proof Requirements

In most situations arising in employment, housing, mortgage services and places of public accommodation, it will not be appropriate to request documentation of an individual's gender identity. In the limited circumstances where it is necessary, an individual's gender identity may be demonstrated by any evidence that the gender identity is sincerely held as a part of the person's core identity. The evidence that the Commission will review in cases alleging gender identity discrimination includes, but is not limited to, medical history, medical/psychiatric care or treatment of the gender-related identity; consistent and uniform assertion of the gender-related identity or any other evidence that one's gender-related identity is sincerely held as part of one's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.

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[17] Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass. Super. Ct. 2002). Sexual orientation is based on the direction of one's physical and romantic attractions, which may include, but is not limited to heterosexual, homosexual, lesbian and bisexual.

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G.L. c. 4, § 7; Fifty-ninth see infra Section III C. Examples of the type of evidence which will assist the Commission in investigating claims of gender-identity discrimination are:

- Sworn statements by a Complainant and/or witnesses relating to the Complainant's sincerely held core gender-related identity;
- Sworn statements from the Complainant and/or witnesses relating to the Complainant's routine activities and conduct, such as dress, grooming, actions and use of gender pronouns;
- Sworn statements and/or medical records from medical or other professionals involved in the treatment of or transition of the individual seeking, in the process of, or who has completed gender transition;
- Evidence of hormone use, gender affirming surgeries, and/or other procedures that are for the purpose of affirming gender identity;
- Evidence of an effort to effectuate a legal name change, revision of birth certificate, passport, or Social Security card, re-designation of gender on a Massachusetts Department of Transportation Registry of Motor Vehicles form, or other legal documents reflecting gender identity.

C. Meaning of "Sincerely Held and Part of a Person's Core Identity"/Improper Purpose

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The law excludes from its coverage a gender-related identity that is "asserted for any improper purpose," such as an unlawful purpose. For instance, a fraudulent representation to obtain an otherwise unavailable employment-related benefit or a fraudulent effort to evade a legal obligation or an effort to commit a crime could constitute an improper purpose.

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orientation.[19] As described in Section I, the Commission has held that discrimination against transgender individuals may be prohibited under the proscriptions against gender and disability discrimination. MCAD and Jackie Ravesi v. Naz Fitness Group, supra; Millett v. Lutco, supra.; Jette v. Honey Farms Mini Market, supra. The facts of a particular case may also support a claim of discrimination based on sexual orientation. Id.

Examples of discrimination in an educational institution include:

- A graduate school refuses to admit a transgender man who applies when it learns from the applicant's educational records that he previously identified as a woman.[20]

- A graduate school refuses to allow a transgender woman graduate student to serve as a resident assistant in a woman's dormitory because she previously identified as a man.

V. Best Practices

The Commission encourages employers, housing providers, places of public accommodation and all entities subject to the law to foster an inclusive and welcoming environment by following best practices recommended by the American Bar Association[21] which may include the following:

- Revise non-discrimination, equal opportunity, non-harassment, and other employment-related policies to include a statement that discrimination and harassment on the basis of gender identity is prohibited;

- Update personnel records, payroll records, email systems, and other documents to reflect employee's stated name and gender identity, and ensure confidentiality of any prior documentation of an employee's pre-transition name or gender marker;

- Prohibit derogatory comments or jokes about transgender persons from employees, clients, vendors and any others, and promptly investigate and discipline persons who engage in discriminatory conduct;

- Use names, pronouns, and gender-related terms appropriate to employee's stated gender identity in communications with employee and with others;

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[19]The Massachusetts Department of Elementary and Secondary Education ("DESE") enforces G.L. c. 76, §5, which prohibits discrimination on the basis of gender identity in Massachusetts public schools. The Attorney General's Office also enforces Massachusetts laws prohibiting hate crimes on the basis of gender identity in public schools, G.L. c. 22C, §32; discrimination in public and charter schools. G.L. c. 22C, §32; G.L. c. 71, §89; G.L. c. 76, §§5, 2B. See http://www.doe.mass.edu/ssce/GenderIdentity.pdf. In May, 2016, the U.S. Department of Education, Office of Civil Rights, announced that it would treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations, and that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.

[20] The Fair Educational Practices Act prohibits discrimination against any person seeking admission to a vocational training institution or to a program or course of study leading to a degree, beyond a bachelor's degree, because of sex or to discriminate against any student on the basis of gender, sexual orientation, admitted to a vocational training institution in providing benefits, privileges, and placement services.

[21] American Bar Association's Commission on Sexual Orientation and Gender Identity, "Best Practices for Promoting LGBT Diversity" published 2011.

- Avoid gender-specific dress codes and permit employees to dress in a manner consistent with their gender identity;

- Provide the public and employees access to any sex-segregated facility, i.e. bathrooms, locker room facilities, based on the employee's stated gender identity;

- Incorporate in diversity, anti-discrimination, and anti-harassment trainings information about transgender individuals and employees, whether or not there are currently transgender employees, or employees who have self-identified as transgender, at the workplace or in the place of public accommodation;

- Employers should investigate and take appropriate remedial action when on notice of harassing or discriminatory conduct in the workplace;

- Landlords or property owners should take appropriate remedial action to ensure cessation of harassment by other tenants based on gender identity.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Horizon Christian Fellowship et al., **Plaintiffs,** **v.** **Jamie R. Williamson, Sunila T. George, and Charlotte G. Richie, in their official capacities as Commissioners of the Massachusetts Commission Against Discrimination; and Maura Healey, in her official capacity as the Attorney General of Massachusetts,** **Defendants.**	**CIVIL ACTION NO. 16-12034-PBS**

AFFIDAVIT OF GENEVIEVE C. NADEAU

I, Genevieve Nadeau, state as follows:

1. I am an Assistant Attorney General in Massachusetts, and I am the Chief of the Attorney General's Civil Rights Division.

2. On September 1, 2016, the Attorney General's Office issued "Gender Identity Guidance for Public Accommodations." A true copy of that Guidance is attached as Exhibit A.

3. At the time of the filing of the complaint in this action on October 11, 2016, the Attorney General's website listed numerous examples of public accommodations, including many examples listed in the Attorney General's Guidance, as well as laundromats, dry-cleaners, gas stations, barber shops, concert halls, bowling alleys, auditoriums, and convention centers. At that time, the website also included "houses of worship" as one example.

4. As I explained in a letter to plaintiffs' counsel, dated November 7, 2016, the Attorney General at that time revised the Attorney General's website to remove the reference to "houses

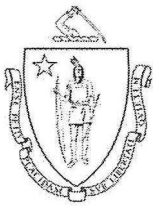
of worship." A true copy of that letter is attached as Exhibit B.

5. To date, the Attorney General's Office has not received any complaints alleging discrimination by any of the plaintiffs under the public accommodations law. In addition, as far as I am aware, the Attorney General's Office has not communicated directly with plaintiffs concerning the public accommodations law.

Signed under the penalties of perjury this 7th day of December, 2016.

Genevieve C. Nadeau
Assistant Attorney General
Chief, Civil Rights Division

EXHIBIT A



MAURA HEALEY
ATTORNEY GENERAL

Gender Identity Guidance for Public Accommodations
September 1, 2016

Effective October 1, 2016, Massachusetts law prohibits discrimination based on gender identity in places of public accommodation.[1] This document is intended to help businesses and other places of public accommodation comply with the law. First, it provides definitions and general information about obligations under the law. Second, it provides specific information regarding the use of sex-segregated facilities such as restrooms and locker rooms. Third, it provides guidance on how to address circumstances in which there is reason to believe an individual is asserting gender identity for an improper purpose, such as to engage in unlawful conduct.

Massachusetts law now explicitly prevents places of public accommodation from discriminating against, harassing, or providing different or inferior service to an individual based on gender identity. It also protects the right of all people – including transgender people – to use sex-segregated facilities that are most consistent with their sincerely held gender identity. In states with similar laws, reports of the improper assertion of gender identity have been exceedingly rare. Therefore, in most circumstances, a place of public accommodation should presume that an individual is using the appropriate facility. When there is a legitimate reason to believe that someone is not using the appropriate facility, a limited inquiry may be warranted in order to ascertain that person's gender identity.

This law does not allow individuals to gain access to a sex-segregated facility that is not consistent with their gender identity. Nor does it protect anyone, regardless of gender identity, who engages in improper or unlawful conduct in a sex-segregated facility or elsewhere (see Section IV below). If a person engages in improper or unlawful conduct, a business or other place of public accommodation may remove the patron and, if warranted, refer the matter to law enforcement.

I. DEFINITIONS

Gender identity, as defined under Massachusetts law, means "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." In essence, gender identity is a person's internal sense of their own gender. The law provides that gender identity must be "sincerely held as part of a person's core identity."

Transgender is a term that is used to refer to a person whose gender identity is different from that person's assigned birth sex. The person knows that the gender typically associated with their body does not match who they know they are inside. For this reason, many transgender people transition and live as the gender they know themselves to be.

[1] G.L. c. 272, §§ 92A and 98.

Public accommodations include businesses that are open to and serve the public. They include any place "which is open to and accepts or solicits the patronage of the general public," regardless of whether it charges for products, goods, services, or admission. A place of public accommodation may be publicly or privately owned or operated. Examples of public accommodations include, but are not limited to: hotels, stores, restaurants, theaters, sports stadiums, health and sports clubs, hospitals, transportation services, museums, libraries, and parks.

For more information about what is considered a place of public accommodation under Massachusetts law, please see G.L. c. 272, § 92A.

II. GENERAL OBLIGATIONS

The law provides that a place of public accommodation may not discriminate against an individual based on that individual's gender identity. Unlawful discrimination includes, but is not limited to:

- Refusing or denying service;
- Offering a different or inferior class or quality of service or a more limited set of products, goods, services, or facilities than are available to others;
- Advertising or otherwise publicizing that it does not accept business from, or the patronage of, transgender or gender non-conforming individuals;
- Providing false information about the availability of products, goods, services, facilities, or admission; and
- Harassment and intimidation.

III. SEX-SEGREGATED FACILITIES

The law provides that all people, including transgender people, may use whichever sex-segregated facilities, including restrooms, locker rooms, and changing rooms, are most consistent with their gender identity (rather than their assigned birth sex).

Does the law prohibit sex-segregated facilities, including men's/women's restrooms, locker rooms, and changing rooms?
No. Places of public accommodation may still maintain sex-segregated restrooms, locker rooms, and changing rooms. However, under this law, individuals may use whichever sex-segregated space is most consistent with their gender identity.

What should a place of public accommodation do if a patron complains about the presence of a transgender person in a sex-segregated facility?
This law is intended to ensure that all people, regardless of their gender identity, have equal access to places of public accommodation, including bathrooms, locker rooms, and changing rooms.

If a patron complains about the mere presence of a transgender person in a sex-segregated facility, or a patron expresses concern that someone may be using the incorrect facility based on that person's appearance, a place of public accommodation should first assess whether there is any reasonable basis to believe that person is not using the appropriate facility most consistent with their gender identity (see below).

If there is no legitimate reason to question, or that person confirms, that they are using the facility most consistent with their sincerely held gender identity, a place of public accommodation may still take certain steps to address the privacy concerns of the complaining patron. A place of public accommodation may:

- Remind the complaining patron that Massachusetts law protects the right of all people, including transgender people, to access sex-segregated facilities most consistent with their gender identity, as long as the individual is not engaged in any improper or unlawful conduct;
- Offer any patron seeking additional privacy, including the complaining patron, an accommodation, such as a privacy screen, curtained area, or private changing room, if available;
- Offer any patron, including the complaining patron, the opportunity to use a private facility, such as a unisex bathroom or changing room, if available (see below); or
- Institute a neutral policy that applies to all patrons regardless of gender identity to address privacy concerns, such as a requirement that clothing be worn in certain areas of a facility.

Businesses are not obligated to provide privacy accommodations, such as a privacy screen, curtained area, or private changing room. But if a business chooses to do so, it must make such accommodations available to everyone, regardless of gender identity. The business cannot require or encourage any patron to accept an accommodation based on gender identity (see more below).

What should a place of public accommodation do if it has reason to believe that a person is not using the appropriate sex-segregated facility?

Misuse of sex-segregated facilities is exceedingly rare. As a general matter, employees of a place of public accommodation should presume that an individual is using the correct facility (the one most consistent with their gender identity), if the person is not engaged in any improper or unlawful conduct.

Employees of a place of public accommodation should not assume an individual's gender identity solely by appearance. The fact that a woman, whether transgender or not, is perceived as having a "masculine" appearance is not a legitimate reason to exclude her from, or question her presence in, a sex-segregated facility intended for women. Similarly, the fact that a man may appear "feminine" is not a credible basis to exclude him from, or question his presence in, a sex-segregated facility intended for men.

Inquiry into a person's gender identity is generally not necessary. However, if a place of public accommodation has a legitimate concern about whether a person is using the appropriate facility,

an employee may attempt to resolve the issue through a private and discrete conversation with that person. A legitimate concern arises where, due to the behavior of the person in question, the place of public accommodation is reasonably worried about potentially improper or unlawful conduct. Under such circumstances, an employee may approach a patron privately, out of the earshot of others, and ask, for example: "Are you using the appropriate facility?" In most cases, if the person confirms that they are using the facility most consistent with their gender identity, that should be the end of the inquiry (unless there is a reasonable basis to believe that the person is actually engaging in improper or unlawful conduct, as discussed in Section IV below).

In the vast majority of cases, it is not appropriate for a place of public accommodation to request documentation of an individual's stated gender identity. However, a request for documentation may be permissible in the limited circumstance in which the person is, or is seeking to become, a member in an organization that regularly requires documentation of gender for all members on an equal basis, such as a health or sports club.

In that circumstance, an individual's gender identity may be demonstrated by **any one** of the following: (1) a driver's license or other government issued identification; (2) a letter from a doctor, therapist, or other healthcare provider; (3) a letter from a friend, clergy, or family member regarding the person's routine conduct, such as dress, grooming, and use of corresponding pronouns; or (4) any other evidence that the gender identity is sincerely held as part of the person's core identity. A place of public accommodation may not use a request for documentation to harass, intimidate, embarrass, or otherwise discriminate against a person based on gender identity.

May a place of public accommodation provide a private or single-occupancy space or other privacy accommodation as an alternative to its sex-segregated shared facilities?
Yes. A place of public accommodation may make a private or single-occupancy space available as an alternative to its men's/women's facilities. If a place of public accommodation chooses to offer a private space, it must make the space available on the same terms and in the same manner to all patrons, regardless of their gender identity. Although a place of public accommodation may offer a private space, it cannot require or encourage any person to use that space instead of its sex-segregated facilities based on their gender identity.

Does the law require places of public accommodation to build gender-neutral and/or unisex facilities?
No. This law does not require places of public accommodation to build gender-neutral facilities, such as unisex or single occupancy bathrooms or locker rooms. However, places of public accommodation may do so, if they so choose.

IV. IMPROPER OR UNLAWFUL CONDUCT

What does it mean to assert gender identity for an improper purpose?
This law explicitly provides that a person may not assert gender identity for an "improper purpose." This means that a person may not fraudulently assert gender identity to gain access to a sex-segregated facility in which they would otherwise not be permitted. It also means that a

person may not assert gender identity for the purpose of engaging in improper or unlawful conduct. Examples of improper or unlawful conduct may include, but are not limited to:

- Loitering in a facility for the purpose of observing other patrons;
- Harassment of an employee or patron;
- Threats or violence towards another person;
- Photographing or videotaping other patrons without permission; or
- Other violations of existing law, including criminal law.

This new law does not provide any protections for someone who engages in improper or unlawful conduct, whether in a sex-segregated facility or elsewhere. Nor does it provide a defense to criminal charges brought against someone engaged in unlawful conduct. Anyone who engages in unlawful conduct in a sex-segregated facility or elsewhere may properly be questioned, detained, and reported to law enforcement (see below). This new law does not affect any existing criminal laws or their applicability to any particular conduct.

Does this law allow a person to access a sex-segregated facility that is not consistent with their gender identity?
No. This law protects the right of individuals to use sex-segregated facilities that are most consistent with their gender identity. It does not allow an individual to fraudulently assert gender identity in order to gain access to sex-segregated facilities in which they would otherwise not be permitted. In such circumstances, it may be appropriate for a place of public accommodation to take action consistent with its usual policies regarding the removal or suspension of patrons who engage in improper conduct.

What should a business or place of public accommodation do if it believes a person is engaging in improper or unlawful conduct, either in a sex-segregated space or elsewhere?
If an employee of a public accommodation has reasonable grounds to believe that a person, regardless of gender identity, is engaged in improper or unlawful conduct (as discussed above), the employee may address the situation through whatever means the business typically addresses misconduct by a patron, including asking the patron to leave, or calling security or law enforcement. If a person asserts gender identity to access a sex-segregated facility for the sole purpose of engaging in unlawful conduct, that person may properly be referred to law enforcement. In such circumstances, a place of public accommodation may take action consistent with its usual policies regarding contacting law enforcement to address the unlawful conduct of a patron.

However, any referral to law enforcement must be based on an individual's unlawful conduct, and not on the individual's gender-related identity or appearance. In no event may a place of public accommodation seek to use law enforcement or security to harass or embarrass a person based on gender identity.

Questions: If any business or other place of public accommodation has any questions about its obligations and responsibilities under this law, or how to address recurring situations that may arise, please contact the Civil Rights Division of the Attorney General's Office at (617) 963-2917.

EXHIBIT B

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
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November 7, 2016

BY E-MAIL & FIRST-CLASS MAIL

Steven O'Ban, Esq.
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260

Re: Horizon Christian Fellowship et al. v. Jamie Williamson et al., Civil Action No. 16-12034 (U.S. District Court, D. Mass.)

Dear Mr. O'Ban:

I am writing to inform you that the Attorney General's Office has revised its website to remove the categorical reference to "houses of worship" as an example of a "place of public accommodation" within the meaning of Mass. Gen. Laws c. 272, §§ 92A & 98. *See* http://www.mass.gov/ago/consumer-resources/your-rights/civil-rights/public-accomodation.html. As set forth in section 92A, a "place of public accommodation" is defined as "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public . . ." While religious facilities may qualify as places of public accommodation if they host a public, secular function, an unqualified reference to "houses of worship" was inconsistent with *Donaldson v. Farrakhan*, 436 Mass. 94 (2002), and we have removed that reference.

In *Donaldson*, the Massachusetts Supreme Judicial Court considered whether the public accommodation law, M.G.L. c. 272, §§ 92A & 98, applied to a religiously affiliated event that was not open to women. The event in question was a speaking event promoted, organized, and funded by a mosque, and presented by minister Louis Farrakhan at a city-owned theater, to address drugs, crime, and violence in the community. 436 Mass. at 97-100. The Court found that the event was not a "public, secular function" of the mosque. *Id.* at 100. The Court also found that application of the public accommodation law to require the admission of women to the event "would be in direct contravention of the religious practice of the mosque" because it would impair the "expression of religious viewpoints" of the mosque with respect to the "separation of the sexes" and the role of men in the community. *Id.* at 101-02. The Court thus further held that the "forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute" would "significantly burden" the mosque's First Amendment rights of expression and association. *Id.*

The Court's decision in *Donaldson* continues to provide important guidance on the application of M.G.L. c. 272, §§ 92A & 98. The recent amendments to the statute, adding "gender identity" to the categories of impermissible bases for discrimination, do not affect the definition of "public accommodation."

Your lawsuit caused us to focus on these issues and to make this revision to our website. Thank you for bringing the issue to our attention.

Please feel free to contact me if you have any questions or would like to discuss this further.

Very truly yours,

Genevieve Nadeau

Genevieve C. Nadeau
Chief, Civil Rights Division
(617) 963-2121

cc: Philip D. Moran, Esq.